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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-1034

CLAY BAIN and KATHRYN M. BAIN,

Petitioners,

vs.

THE MAY DEPARTMENT STORES COMPANY, a corporation; TRW CREDIT DATA,

Respondents.

Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Introduction.

Respondent, the May Department Stores Company, files this opposing brief under Supreme Court Rule 24 and prays that this Court deny the Petition for Writ of Certiorari to review the Order of the Supreme Court of the State of California.

Respondent had demurred to the Complaint. The general demurrer was sustained and leave was granted to amend the Complaint. Appellants elected not to amend, and on motion by Respondent the Superior Court dismissed the action pursuant to subdivision 3 of Section 581 of the California Code of Civil Procedure. A judgment was entered in favor of Respondent.

The Court of Appeal of the State of California, Second Appellate District, affirmed the judgment of the Superior Court as to this Respondent.

The Supreme Court of the State of California, in Bank denied appellants' petition for hearing.

Questions Presented.

1. Does the Supreme Court have jurisdiction to grant a writ of certiorari?

2. Does the Fair Credit Reporting Act apply to retail merchants such as Respondent?

3. Does the fourth cause of action of the Complaint allege a willful failure by Respondent to comply with any requirement of the Fair Credit Reporting Act?

Statement of the Case.

The Complaint purports to state four causes of action against Respondent. Only the fourth cause of action pertains to the Fair Credit Reporting Act. In each cause of action it is contended that the following entry on appellants' credit profile, prepared by TRW, caused appellants to be denied credit:

Company	Status	Date Reported
The May Company	Charge-off	January 1971

Only the fourth cause of action pertains to the Fair Credit Reporting Act.

Appellants purchased merchandise on credit from May Company. A dispute arose between appellants and May Company over the amount of the debt created by this purchase. In July 1970, legal action was initiated against appellants by Universal Credit Bureau on behalf of May Company to recover monies allegedly due on the disputed debt. That lawsuit was terminated by dismissal with prejudice after a negotiated settlement between appellants and Universal Credit Bureau.

Appellants contend that they were denied credit after their payment of the negotiated settlement and the dismissal with prejudice. Appellants claim that they were denied credit by third parties who obtained credit information concerning appellants from TRW, a credit reporting agency. Appellants further allege that the "inaccuracy" of the "charge-off" entry was brought to May Company's attention; that May Company advised TRW that May Company had settled the legal action for an amount less than the balance allegedly owing; and that May Company "willfully misrepresented" the status of appellants' credit standing by refusing to request that TRW delete the "charge-off" entry from its credit profile.

1. Allegations of the Fourth Cause of Action.

The fourth cause of action states that the alleged conduct of May Company falls within the purview of §1681n of the Fair Credit Reporting Act. Title 15, U.S.C. §1681 *et seq.*

Section 1681n provides the following:

> "Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—
>
> (1) Any actual damages sustained by the consumer as a result of the failure;
>
> (2) Such amount of punitive damages as the court may allow; and . . ."

A further reading of the fourth cause of action shows that appellants contend that Respondent failed to delete the "charge-off" entry from TRW's "file" (see 1681a(g) for definition) and thus "willfully failed" to

comply with §1681i of the Act, which provides in part as follows:

"(a) If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the *consumer reporting agency* by the consumer, the *consumer reporting agency* shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant. If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the *consumer reporting agency* shall promptly delete such information. The presence of contradictory information in the consumer's file does not in and of itself constitute reasonable grounds for believing the dispute is frivolous or irrelevant." (Emphasis supplied).

2. Opinion of the Court of Appeal With Regard to the Fourth Cause of Action.

The following is the Court of Appeal's succinct holding:

"In plaintiffs' fourth cause of action, they have not alleged a willful or negligent' failure on the part of defendant May Co. to comply with any requirement of title 15 of the United States Code, chapter 41, subchapter III, Credit Reporting Agencies, sections 1681-1681t. Nor have plaintiffs al-

leged any other actionable conduct on the part of May Co. which might support a cause of action. The general demurrer of defendant May Co. was properly sustained as to all four causes of action of plaintiffs' complaint."

Footnote number 4, referred to in the paragraph above, states the following:

"'The applicable statutes provide for the civil liability of '[a]ny consumer reporting agency or user of information' which 'willfully fails' or 'is negligent in failing' to comply with any requirement of Title 15 of the United States Code, chapter 14, subchapter III, with respect to any consumer. (15 U.S.C. §§ 1681n, 1681o.)"

REASONS THAT THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT.

1. The Court in This Instance Does Not Have Jurisdiction to Grant a Writ of Certiorari.

A. The Court of Appeal's Opinion Does Not Question the Validity of the Fair Credit Reporting Act.

Title 28, U.S.C. § 1257(3) provides, in essence, that the United States Supreme Court may review a decree of the California Supreme Court by writ of certiorari where certain specific circumstances are present. None of those circumstances are present in the instant case. Specifically, the validity of the Fair Credit Reporting Act has not been drawn in question. Therefore, this Court does not have jurisdiction to grant such a writ.

B. The Judgment of Dismissal Must Be Affirmed, on Appellants' Election to Stand on Their Complaint, Where the Complaint Is Insufficient on Any Grounds Specified in Respondent's Demurrer.

In the Superior Court action the appellants elected to stand on their pleadings and not to amend following the Order sustaining Respondent's general and special demurrers.

Since appellants elected not to amend, a strict construction of their pleadings is required. In addition, it must be assumed that appellants pleaded as strong a case as they could.

> *Bradler v. Craig* (1969) 274 Cal.App.2d 446, 470.

The court in *Sierra Investment Corporation v. Sacramento County*, 252 Cal.App.2d 339, at page 347, 60 Cal.Rptr. 519, stated as follows:

> "It is almost axiomatic that under the circumstances the judgment of dismissal must be affirmed if the Complaint is objectionable upon any grounds raised by the demurrer (case cited). Consequently, this court does not have the power to reverse the trial court by setting aside a proper judgment of dismissal in order to give appellant the opportunity to amend its complaint at this stage of the proceeding. . . ."

The court in *Bernstein v. Piller*, 98 Cal.App.2d 441, at page 443, stated as follows:

> "On appeal from a judgment entered after the sustaining of a demurrer the order of the trial court if in general terms must be affirmed by the appellate court if the demurrer is well taken as to any of the grounds stated therein."

2. The Fair Credit Reporting Act Does Not Apply to Retail Merchants Such as Respondent.

The heading for subchapter III of the Fair Credit Reporting Act reads as follows: "CREDIT REPORTING AGENCIES". Therefore, the subchapter heading itself strongly suggests that the Act is directed towards credit reporting agencies such as TRW and not towards retail merchants such as May Company.

> "It is the purpose of this subchapter to require that *consumer reporting agencies* adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter." § 1681a(4)(b) (Emphasis supplied).

The term "consumer reporting agency", as defined in § 1681a(f) and used constantly throughout subchapter III, does not apply to retail merchants such as May Company. The term does refer to the following:

> "Any person which . . . regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

Since Respondent is not a consumer reporting agency, it must be determined that Respondent is a "user of information" in order to be affected by § 1681n of the Act. Respondent submits that it is not a "user of in-

formation". Rather, a "user" is the person to whom a consumer reporting agency provides information.

According to § 1681b of the Act, a consumer reporting agency may furnish a consumer report under the following circumstances and no other:

. . .

(3) "To a person which it has reason to believe—

(A) Intends to *use* the information in connection with a credit transaction involving the consumer on whom the information is to be furnished. . . .

(B) Intends to *use* the information for employment purposes; or

(C) Intends to *use* the information in connection with the underwriting of insurance involving the consumer; or

(D) Intends to *use* the information in connection with a determination of the consumer's eligibility for a license. . . .

(E) Otherwise has a *legitimate business need* for the information in connection with a business transaction involving the consumer." (Emphasis supplied).

Under the circumstances of this case, Respondent May Company would neither "use the information" nor have a "legitimate business need" to receive the information furnished in the consumer report of TRW, a consumer reporting agency. In fact, since in this case Respondent communicated information to TRW, there certainly was no reason for Respondent to receive or use that same information.

In summary, Respondent is neither a consumer reporting agency nor a user of information. Therefore, Respondent is not affected by the provisions of § 1681n.

3. The Fourth Cause of Action of the Complaint Does Not Allege a Willful Failure by Respondent to Comply With Any Provision of the Fair Credit Reporting Act.

A. Respondent Did Not Violate Section 1681i Since That Provision Affects Only Consumer Reporting Agencies.

A reading of the fourth cause of action shows that appellants contend that Respondent failed to delete the "charge-off" entry from TRW's "file" and thereby "willfully failed" to comply with § 1681i of the Act. Section 1681i refers to the procedure to be followed in the case of the disputed accuracy of information contained in the "file" of a *consumer reporting agency*. Respondent submits that this provision imposes no duties upon retail merchants such as May Company.

Section 1681i(a) imposes two duties upon credit reporting agencies. (1) ". . . the consumer reporting agency shall . . . reinvestigate and record the current status of that information . . .; (2) the consumer reporting agency shall promptly delete such information [if after reinvestigation such information is found to be inaccurate or can no longer be verified]".

It is noted that § 1681i(a) refers only to information contained in the consumer reporting agency's "file". Section 1681a(g) defines the term "file" as follows: "When used in connection with information on any consumer, [file] means all of the information on that

consumer recorded and retained by a consumer reporting agency regardless of how the information is stored."

It is also noted that §§ 1681i(b), (c), and (d) impose further duties upon the consumer credit agency and no duties upon retail merchants such as May Company.

B. Nothing in the Fair Credit Reporting Act Requires the Deletion Upon Demand of Information in Consumer Reports.

Section 1681i requires that the consumer reporting agency, after reinvestigation, promptly delete information *found to be inaccurate or unverifiable.* The Complaint contains no allegations that the consumer reporting agency, TRW, found the "charge-off" entry to be inaccurate or unverifiable. Therefore, there was no violation, willful or unwillful, of § 1681i. Of course, even if the Complaint did contain such factual allegations, only TRW, the credit reporting agency, and not May Company, the retail merchant, would be under the duty to delete the "charge-off" entry from the consumer report.

C. The Language of Section 1681c(a)(4) Strongly Implies That a "Charge-Off" Entry in a Consumer Report Does Not Violate Any Provision of the Fair Credit Reporting Act.

(a) "Except as authorized under subsection (b) of this section, no consumer reporting agency may make any consumer report containing any of the following items of information:

> (4) Accounts placed for collection or charged to profit and loss which *antedate the report by more than seven years.*" § 1681c(a)(4).

According to the above quoted provision, *accounts* placed for collection or *charged to profit and loss* which do not antedate the consumer report by more than seven years are proper entries in consumer reports. Therefore, the "charge-off" entry in the consumer report was proper.

D. Appellants' Use of Conclusionary Terms, Such as "willful, oppressive, unlawful, and malicious", Are Insufficient in Themselves to Support Any Cause of Action Under Title 15 U.S.C. Section 1681n.

The general rule condemns as legal conclusions general allegations to the effect that acts were done maliciously, willfully, and oppressively, in the absence of specific facts pleaded. See *Locke v. Mitchell,* 7 Cal. 2d 599; *Jackson v. Underwriters Report,* 21 Cal.App. 2d 591; *Everett v. California Teachers Association,* 208 Cal.App.2d 291; *Noonan v. Rousselot,* 239 Cal. App.2d 447.

The Complaint herein merely characterizes Respondent's conduct "as willful, oppressive, unlawful and malicious" without stating facts sufficient to support those allegations. Every statement of fact in the Complaint must be direct and certain and not by way of surmise.

> *Bernstein v. Piller,* 98 Cal.App.2d 441, at 443 (1950).

The allegations of the Complaint with respect to the alleged malice do not constitute malice in fact as required by the cases.

Gombos v. Ashe, 158 Cal.App.2d 57.

In the recent opinion in *Ebaugh v. Rabkin,* 22 Cal. App.3d 891, at 895, the Court defined malice as follows:

> "Under general definition, malice in fact denotes ill will on the part of the defendant, or his desire to do harm for the mere satisfaction of doing it. In ultimate analysis, malice in fact is malice of evil motive."

Appellants contend that Respondent is liable merely because they dispute the status of their account and because Respondent willfully misrepresented the status of their account.

Assuming, for the moment, that the Fair Credit Reporting Act does potentially impose civil liability on this Respondent for willful misrepresentation, nothing appears in the Act to require Respondent to remove an entry from a credit rating report or consumer report *merely because demand has been made by the consumer.* The Act does *anticipate* disputes as to the accuracy or completeness of the information in a consumer's credit file and does *provide* detailed procedures to be followed in those instances. 15 U.S.C. § 1681i.

Respondent submits that appellants failed to utilize the remedies provided in the Fair Credit Reporting Act. Respondent further submits that, if it made a misrepresentation of the status of appellants' account, there are no facts in the court record even hinting that the alleged misrepresentation was "willful".

Conclusion.

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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